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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE BETH LABSON FREEMAN, JUDGE

ALICE SVENSON, individually and	)	
on behalf of all others similarly	)	
situated,	)	
	)	
Plaintiff,	)	
	)	
VS.	)	NO. C 13-4080-BLF
	)	
GOOGLE INC., a Delaware	)	
Corporation, and GOOGLE PAYMENT	)	
CORPORATION, a Delaware	)	
Corporation,	)	
	)	San Jose, California
Defendants.	)	Thursday
	)	June 26, 2014
	)	9:17 a.m.

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TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

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Reported by:	BELLE BALL, CSR #8785, CRR, RDR
	Official Reporter, U.S. District Court



1 **THURSDAY, JUNE 26, 2014**

**9:17 A.M.**

2 **P R O C E E D I N G S**

3 **THE CLERK:** Calling Case 13-CV 40820, Svenson versus  
4 Google, Inc., et al. Counsel, please state your appearances.

5 **MS. FAHRINGER:** Good morning, Your Honor. Susan  
6 Fahringer on behalf of Google, Inc. and Google Payment  
7 Corporation. With me today is my colleague, Charles Sipos.

8 **MR. SIPOS:** Good morning, Your Honor.

9 **MR. JABLONSKI:** Good morning, Your Honor. Frank  
10 Jablonski on behalf of Alice Svenson.

11 **THE COURT:** Good morning.

12 Well, to say I had extensive briefing would be an  
13 understatement in this case. And, I -- certainly many issues  
14 have been raised here at this motion to dismiss. I have a  
15 number of questions.

16 But, perhaps I would be best served by hearing from each  
17 of you -- first, Ms. Fahringer -- if I can, anything you'd  
18 like to add. I did spend quite a bit of time with your  
19 papers, but there was a lot to sink my teeth into.

20 **MS. FAHRINGER:** Understood, Your Honor. There is a  
21 lot of briefing on this motion, and there are a lot of reasons  
22 to dismiss the complaint, in our view.

23 I would start with the SCA claims --

24 **THE COURT:** Okay.

25 **MS. FAHRINGER:** -- because we're asking the Court to

1 dismiss those claims with prejudice.

2 Unless -- unless the Court has specific questions on those  
3 claims, to begin, the overall view of those claims is: To  
4 adopt the position Plaintiff would have this Court adopt would  
5 be to go beyond the SCA's claim language, and beyond cases  
6 interpreting the SCA.

7 Essentially, the Plaintiff is asking this Court to go  
8 where no court has gone before. And here's why. I'll start  
9 with Section 2702. That was the subject of our supplemental  
10 briefing.

11 **THE COURT:** And, 2702 is the harder one. I thought  
12 2701 was a clearer case. I could maybe be persuaded  
13 otherwise. But, I have reviewed the briefing at some level.

14 And I will say on 2702, it's a little baffling to me to  
15 read *Zynga* and the *Pharmatrak* case that our Ninth Circuit has  
16 adopted, endorsed and embraced, it is very strong language,  
17 saying that they got it right. But, to also look at the  
18 exception in 2702 for name, phone number.

19 And so, you know, you're going right there, but that's  
20 where I'm puzzling as well.

21 **MS. FAHRINGER:** And I'm prepared to discuss that.  
22 And the reason, frankly, that I wanted to discuss 2702 first  
23 is because I do think 2701 is the much more straightforward  
24 argument.

25 **THE COURT:** Yeah.

1           **MS. FAHRINGER:** As to 2702, it regards disclosure of  
2 electronic communication. And the Plaintiff here concedes,  
3 there's no argument that if information at issue in this case  
4 is record information, as opposed to the contents of  
5 communications, there's no violation of 2702.

6           **THE COURT:** So, does "record" equate to  
7 "automatically generated"?

8           **MS. FAHRINGER:** Great question. And the answer is  
9 for Wiretap Act cases -- and it's important to recognize that  
10 the automatically-generated test is a court-imposed rule of  
11 thumb that is applied in Wiretap Act cases.

12           There is not a single case that applies the  
13 automatically-generated test that doesn't also have a Wiretap  
14 Act claim --

15           **THE COURT:** And *Zynga* had a Wiretap Act.

16           **MS. FAHRINGER:** Exactly. And *Pharmatrak* was entirely  
17 Wiretap Act. No SCA claim in *Pharmatrak*.

18           **THE COURT:** I don't think I noticed that in  
19 *Pharmatrak*.

20           **MS. FAHRINGER:** Yes.

21           **THE COURT:** I was so interested in the content of the  
22 communication, compared to what is alleged here, that I -- but  
23 I thought that the definition of "content of communication"  
24 was borrowed -- was used in both acts.

25           **MS. FAHRINGER:** That's correct. They share the

1 definitions in 25 --

2 **THE COURT:** But, how could it be sharing a  
3 definition, but used differently?

4 **MS. FAHRINGER:** Yes. The -- the sharing of the  
5 definition --

6 **THE COURT:** Making my head hurt.

7 **MS. FAHRINGER:** These are questions courts struggle  
8 with all the time.

9 **THE COURT:** Uh-huh.

10 **MS. FAHRINGER:** And it's difficult, because it's a  
11 20-plus-year-old statute, and courts are not a fan of this  
12 statute because it is confusing. But, there are a few points  
13 of clarity.

14 The two parts of the ECPA, the SCA and the Wiretap Act,  
15 share the definition of "contents of communications." That  
16 means it's a substance, purport or meaning of a communication.

17 Wiretap Act cases deal with -- with a certain kind of  
18 data. It's in-flight communications, things like intercepted  
19 phone calls. And for that reason, it's helpful to have a rule  
20 of thumb that separates what is typically the contents of  
21 those communications, the conversation on the phone, from  
22 transactional information or automatically-generated  
23 information.

24 And so that rule of thumb, which is the  
25 automatically-generated test, that's a court-developed rule of

1 thumb. It's not statutory. And it's applied in Wiretap Act  
2 cases for that reason.

3 What Zynga did is dealt with -- because it had to contend  
4 both with an SCA claim and a Wiretap Act claim, what Zynga did  
5 was consider the SCA definition of "record information," which  
6 is 2703(c)(2). Over the past 20 years, courts have uniformly  
7 found that the record information listed in the SCA, Section  
8 2703(c)(2), is -- you know, name, subscriber information,  
9 address, phone number -- that that information, that bare  
10 information, is records and not content.

11 And that's not just in re: Zynga.

12 **THE COURT:** Regardless of what source it's derived  
13 from.

14 **MS. FAHRINGER:** That's complicated. If it's buried  
15 in an email, things are a little different. However --

16 **THE COURT:** So I think that's an issue that I had in  
17 reading these papers. And I only have a complaint, of course,  
18 is that I'm not actually sure how this information was  
19 supplied.

20 And that became more complicated when I looked at  
21 *Pharmatrak*. Because in that case, it was -- it seemed like  
22 this was a form that a customer or user had to fill out that  
23 included this medical information which has heightened privacy  
24 interests, and a multitude of laws that overlay the privacy  
25 interests, concerns and rights. And so, I didn't want to get

1 too distracted by it. But, our Ninth Circuit wasn't using  
2 *Pharmatrak* in its limited capacity as invoking the privacy of  
3 medical records.

4 So, do I have enough here in these papers, and in this  
5 complaint -- and if it's just an amendment, then that's easy  
6 to accomplish -- to know whether this is a record or contents  
7 of a communication?

8 **MS. FAHRINGER:** You do. And here's why.

9 **THE COURT:** Okay.

10 **MS. FAHRINGER:** What's alleged in the complaint is  
11 that this information was supplied at creation of the Google  
12 account. That's alleged. There's no dispute about that.

13 **THE COURT:** Right.

14 **MS. FAHRINGER:** And there never will be. This  
15 information, it's not buried in an email. It's supplied,  
16 probably in a form, in connection with account creation.

17 Court after court after court recognize that in the  
18 context of the SCA, that is how service providers get this  
19 information. That's *Obodai, Beluga Shipping, Chevron*.

20 They recognize and acknowledge that the record information  
21 listed in 2703(c)(2) -- name, address, and so forth -- that  
22 that is, even if supplied in a form to a service provider,  
23 necessarily the record information, and not contents.

24 And to go and to -- to decide that suddenly, after 20  
25 years of guidance that says this is record information, not



1 contents, would be to -- to contravene that authority. It  
2 would also be to read 2703(c)(2) out of the statute. Because  
3 if suddenly that information is contents and not a record,  
4 then government authorities needs a search warrant for that  
5 information, rather than a subpoena. And, there are case  
6 after case after case confirming that that information must be  
7 supplied in response to a subpoena.

8 It's simply inconsistent with authority interpreting the  
9 SCA to -- to find that the record information listed in  
10 2703(c)(2) is the contents of communications. It would be  
11 very disruptive.

12 **THE COURT:** What about the fact that his credit card  
13 number is part of this, as well? That goes beyond the statute  
14 in terms of the categories of information it identifies as  
15 exempt, doesn't it?

16 **MS. FAHRINGER:** No, it doesn't. Credit card -- well,  
17 two things. One, there's no allegation in this case that  
18 credit card number was disclosed. No allegation in this case  
19 that credit card number was disclosed.

20 **THE COURT:** Really? Hmm.

21 **MR. JABLONSKI:** Yes, Your Honor. That's correct.

22 **THE COURT:** That's correct? Thank you. I'm sorry I  
23 missed that.

24 **MS. FAHRINGER:** However, credit card information  
25 actually is among the listed -- listed information.

1           **THE COURT:** It is.

2           **MS. FAHRINGER:** Yeah. But in any case, it's not an  
3 issue in this case.

4           **THE COURT:** Okay.

5           **MS. FAHRINGER:** But to emphasize this, the SCA is a  
6 criminal statute. The Plaintiff is -- it is a criminal  
7 statute with civil remedies.

8           **THE COURT:** Okay.

9           **MS. FAHRINGER:** And the Plaintiff is asking this  
10 Court to extend the range of the SCA beyond activity that it  
11 should -- that it should be extended to cover. It should be  
12 interpreted narrowly to cover just the conduct it prohibits,  
13 and nothing more.

14           The automatically-generated test does not apply in the SCA  
15 context. And the fact that the information was supplied in a  
16 form, court after court after court has confirmed that is not  
17 a problem under the SCA. And again, that's *Obodai, Beluga*  
18 *Shipping, Chevron*. And they deal with exactly the same  
19 information as is alleged to be at issue in this case.

20           It is complicated, and the ECPA is hardly a model of  
21 clarity. But again, on this point, it is straightforward.  
22 The information at issue in this case, supplied as it was,  
23 uncontestably supplied in this case, is simply not the  
24 contents of communications. That's the 2702 issue.

25           **THE COURT:** Okay.

1           **MS. FAHRINGER:** As to Section 2701, I think again, as  
2 the Court has noticed, this is fairly straightforward. This  
3 prohibits unauthorized access or access in excess of  
4 authorization to facilities. The facilities here are Google  
5 Zone. It's clear that that's not a violation.

6           **THE COURT:** To me, it was sort of like I can't go up  
7 into my own attic.

8           **MS. FAHRINGER:** That's right.

9           **THE COURT:** And forage around for my own junk.

10          **MS. FAHRINGER:** Yes. It's your attic. You can do  
11 what you want with it.

12          **THE COURT:** Yeah. Yeah. Sorry. You know -- well,  
13 I'll hear -- you hear where I'm going on it. It'll help you  
14 with your argument.

15          **MR. JABLONSKI:** Yes, Your Honor.

16          **THE COURT:** But I -- yeah. Okay.

17          **MS. FAHRINGER:** So, that's our -- I feel we've  
18 covered the points that need to be covered with regard to the  
19 stored communications action.

20          **THE COURT:** Okay.

21          **MS. FAHRINGER:** And again, I covered those first  
22 because we are asking that those claims be dismissed with  
23 prejudice. And the reason for that is that the flaws in these  
24 claims are not flaws in pleading. These are flaws,  
25 fundamental flaws in the theories that are presented. There

1 is no amendment that is capable of correcting the flaws that  
2 are reflected by the allegations here.

3 **THE COURT:** All right.

4 **MS. FAHRINGER:** I would start -- as to the state-law  
5 claims, I would start with the contract claim.

6 The flaw in this claim, as alleged, is that based on the  
7 facts alleged, the Plaintiff here is in exactly the same  
8 economic position before the alleged breach as after the  
9 alleged breach. She hasn't alleged any actual or appreciable  
10 damage caused by the alleged breach. And of course, damage is  
11 an essential element in a contract claim.

12 What she has alleged is that the Defendant made -- the  
13 Defendants made -- allegedly made privacy promises. But, she  
14 won't even allege she read the promises. And she won't even  
15 directly allege she agreed to them.

16 What she alleges on that is at the complaint, Paragraph 68  
17 through 70, quote, "according to Google," she agreed to the  
18 promises. But, she's alleged that. She's alleged the  
19 promises were breached. And, she's presented a number of  
20 theories of damage.

21 First, she's argued that her identity -- she fears that  
22 her identity might be stolen as a result of the alleged  
23 disclosure of this bare registration information. And again,  
24 to be clear, it's not public disclosure. This is disclosure  
25 to the seller from whom she bought an app.

1           **THE COURT:** Yes.

2           **MS. FAHRINGER:** She fears her identity might be  
3 stolen. But cases are clear in California that the mere fear  
4 of that is too speculative to support either Article III  
5 standing or to constitute actual and appreciable damages.

6           She's also alleged and argued in sort of two different  
7 forms, number one, that the app she purchased is worth less  
8 after the breach than before. That is one of her arguments.

9           And the other way she puts this is that she lost the  
10 benefit of her bargain, because she argues that she paid more  
11 for her app -- or that she paid for the privacy promises, to  
12 be clear. So, she makes those arguments.

13           But to be clear, those are theories. They're conclusions.  
14 They are not facts. This Plaintiff has not alleged a single  
15 fact on which this Court -- that this Court can use to  
16 reasonably infer that the -- that the decrease in value of the  
17 app or that the amount paid for the privacy promises was  
18 anything other than zero. There is not a single fact alleged  
19 that allows this Court to reasonably infer that those amounts  
20 are anything other than zero.

21           She hasn't -- for example, she hasn't alleged, this  
22 Plaintiff, that the app was available elsewhere for more or  
23 less with different privacy promises. She won't even allege  
24 -- she alleges that she paid something for the promise, but  
25 she won't even allege that she read the promise.

1        She now argues that part of the payment that she made, the  
2        \$1.77 she paid, she now argues that part of that was for the  
3        service or the privacy -- that included these privacy  
4        promises. But that's not in this complaint. In this  
5        complaint, this Plaintiff alleges that she paid for the app,  
6        not for privacy promises. That's at Paragraph 74.

7        And she doesn't allege that she paid the Defendants. She  
8        is very coy about that. She knows the service was free. She  
9        argues that, quote, "Money changed hands." What she alleges  
10       is that the Defendants pocketed monies, earned money. The  
11       transaction fees are pocketed by Defendants. That's at  
12       Paragraphs 81, 41, 78.

13       But just because money changed hands in not mean that the  
14       Plaintiff has borne her burden to establish injury in fact,  
15       her burden to show that this money changed hands was damage  
16       caused by the alleged breach.

17       **THE COURT:** Doesn't she also allege that her private  
18       information has less value now?

19       **MS. FAHRINGER:** That's part of the -- oh, that -- the  
20       economic injury?

21       **THE COURT:** Yeah.

22       **MS. FAHRINGER:** Well, she sort of alleges that.

23       **THE COURT:** Well, the reason -- I believe she does  
24       argue that. But, there's a May 8, Ninth Circuit case in the  
25       Facebook privacy litigation.

1           **MS. FAHRINGER:** Uh-huh.

2           **THE COURT:** You're probably familiar with this.

3           **MS. FAHRINGER:** Uh-huh.

4           **THE COURT:** I don't know if your firm was actually on  
5 that one, but I'm sure you are.

6           And what was interesting to me is that the Ninth Circuit  
7 in looking at a -- you know, this case, it's similar, although  
8 in the *Facebook* case I believe nothing was paid for the -- for  
9 Facebook, so that issue was not before it.

10          But, they indicate -- the Ninth Circuit says (As read):

11           "Plaintiffs allege that the information disclosed by  
12 Facebook can be used to obtain personal information  
13 about Plaintiffs, and that they were harmed both by  
14 the dissemination of their personal information and  
15 by losing the sales value of that information. In  
16 the absence of any applicable contravening state law,  
17 these allegations are sufficient to show the element  
18 of damages for breach of contract."

19           **MS. FAHRINGER:** Yeah. And that's a different  
20 complaint. It's a different case.

21          What the plaintiffs alleged in that complaint was that  
22 there was a market, and that they intended to sell their  
23 information. That they were stymied. They were unable to --  
24 to trade in their information.

25          That's the opposite of what this Plaintiff alleges. What

1       Svenson --

2               **THE COURT:** I just have the conclusion in this one.

3               **MS. FAHRINGER:** Understood.

4               **THE COURT:** Not fleshed out. However, that would  
5 then beg the question of: Should this Plaintiff be given  
6 leave to amend? And I'll hear on that. I don't know whether  
7 that -- maybe that's not an argument that Plaintiff wants to  
8 pursue.

9               So, it's your contention, though -- and I'm trying to  
10 understand this from the evidence I can consider.

11              **MS. FAHRINGER:** Uh-huh.

12              **THE COURT:** I know we're not in the middle of  
13 discovery; it's not summary judgment.

14              **MS. FAHRINGER:** Uh-huh.

15              **THE COURT:** And I want to be careful not to go there.  
16 But, I believe you're saying in your papers that when a  
17 customer using Google Wallet purchases an app, that the  
18 transaction is between the customer and the app seller. The  
19 vendor.

20              **MS. FAHRINGER:** Yeah.

21              **THE COURT:** Are you saying that Google Wallet  
22 facilitates the payment being made directly to the vendor?

23              **MS. FAHRINGER:** Yeah. The payment -- they would be  
24 the payment processor.

25              **THE COURT:** And the money changed hands, and all of



1 that. Again, I don't -- you're right. I agree with how you  
2 identify what's not said in the allegations. And so, of  
3 course, I'm always looking to see if -- if amendment will cure  
4 it, then of course we go another round.

5 But I -- it's -- I'm not sure -- I don't think you're able  
6 at this point to provide to the Court evidence of whether or  
7 not money -- there's a short stop during the Google Wallet  
8 phase where Google extracts some fee, some portion of the  
9 purchase.

10 And, it may be too soon. We're just at a motion to  
11 dismiss. I'm not asking you to give me more information.  
12 But, I don't think you actually addressed that in your papers.

13 Did you?

14 **MS. FAHRINGER:** I think we can't.

15 **THE COURT:** I don't think you can, either.

16 **MS. FAHRINGER:** Yeah.

17 **THE COURT:** And that's fine. I wanted to make sure I  
18 didn't miss it.

19 **MS. FAHRINGER:** If the complaint survives and we have  
20 to contend with that, we look forward to the opportunity to  
21 show a few things. One is that all of the actions taken were  
22 completely consistent with the privacy policies. And there's  
23 a lot to be said on all of that.

24 **THE COURT:** No, I understand. And the privacy policy  
25 has the as-necessary clause. But, that's not even a

1 summary-judgment issue. We'll be at trial if we get to that,  
2 if that's what we are fighting about.

3 All right. And, I certainly got a little confused as to  
4 which contracts we're dealing with, but I'll deal with that,  
5 too. That's not your concern. That's an easy fix on the  
6 pleadings.

7 **MS. FAHRINGER:** Yeah.

8 **THE COURT:** But, it's your contention that under  
9 these contracts, that the -- the relationship is between the  
10 app vendor and the customer. And Google is really just the  
11 processor.

12 **MS. FAHRINGER:** Google Wallet would be the processor.

13 **THE COURT:** Thank you.

14 **MS. FAHRINGER:** Yes. The buyer is the -- is Svenson,  
15 would be the buyer.

16 **THE COURT:** Right.

17 **MS. FAHRINGER:** And the seller would be the vendor of  
18 the app. In this case, it's YC Droid.

19 **THE COURT:** Okay. Yes, right.

20 And then, the question I also have -- and again, from this  
21 Facebook case, there's this little bit about the UCL.

22 **MS. FAHRINGER:** Uh-huh, yes.

23 **THE COURT:** And what is interesting to me is where  
24 the Court said, "Well, let's go forward on contract damages,  
25 you have enough, you've made enough there, but you haven't

1 made enough on UCL," again, that was a service that wasn't  
2 directly paid for in *Facebook*.

3 **MS. FAHRINGER:** Uh-huh.

4 **THE COURT:** So, losing money or property as a result  
5 of, under Prop 64, would be different there.

6 **MS. FAHRINGER:** Uh-huh.

7 **THE COURT:** But, do you contend that these theories  
8 of benefit of the bargain, or the app having less value would  
9 fall into that, that same analysis of the UCL?

10 **MS. FAHRINGER:** Yeah, I think that for -- for the  
11 same reason that the Plaintiff can't show damage under breach  
12 of contract, the claim fails at the UCL.

13 But in addition to that, an even easier threshold question  
14 is that the fatal flaw as to the UCL claim is very -- it's  
15 conceded -- well, it's not conceded that it's a fatal flaw,  
16 but what is conceded by the Plaintiffs here is that they have  
17 not pled reliance.

18 And the issue is, in our view, they must plead reliance on  
19 these representations in the privacy promises in order to  
20 establish they have standing under the UCL.

21 **THE COURT:** I saw that Plaintiff argued that reliance  
22 wasn't required, unless you use the fraud prong. I don't  
23 think it was conceded. I think it was the opposite.

24 **MS. FAHRINGER:** Right. That's correct.

25 **THE COURT:** And, they have not proceeded under the

1 fraud prong, here. It's the unfair and the unlawful.

2 So clearly, if the 270- -- if the SCA claim goes, then we  
3 may not have an unlawful. But, we'll see on that. But on the  
4 unfair, you're suggesting reliance. We certainly need  
5 causation. It has to be losing money or property as a result  
6 of. Which, it's not quite reliance. I don't think the courts  
7 have equated that language with reliance, like fraud reliance.

8 **MS. FAHRINGER:** Actually, in -- where a UCL claim is  
9 based on misrepresentations, as is the case here --

10 **THE COURT:** Really?

11 **MS. FAHRINGER:** -- where the -- yes, Complaint,  
12 Paragraph 154, in the UCL allegations. 154, 151, 152, 155,  
13 all of these are essentially allegations that -- for example,  
14 Paragraph 154 (As read):

15 "The practice violates reasonable expectations  
16 created by the alleged privacy promises."

17 Complaint Paragraphs 151, 152, 155 are all based on,  
18 essentially, allegedly broken privacy promises. All of these  
19 claims are based on what amounts to saying, "You promised to  
20 do something that you didn't do." It's essentially,  
21 fundamentally, a misrepresentation claim.

22 And when you have a UCL claim that is fundamentally based  
23 in fraud or misrepresentation, California courts -- after  
24 *Kwikset*, California courts are clear that that makes it clear  
25 that in order to establish UCL standing, you have to show

1 reliance on those misrepresentations.

2           **THE COURT:** But a misrepresentation is different than  
3 a broken promise.

4           **MS. FAHRINGER:** Right.

5           **THE COURT:** And I actually think this is -- what they  
6 are alleging is a broken promise, here. Maybe both.

7           You know, again, I didn't read it as misrepresentations,  
8 because that requires an intention to say something you don't  
9 expect to follow through with. We're right back into fraud.

10           I -- I think -- I don't actually read these -- as I say, I  
11 read them as broken promises, breach, unfair to make promises  
12 you're saying that you never intended to keep, as opposed to  
13 changed your mind later.

14           **MS. FAHRINGER:** Uh-huh, yeah. Well, either way,  
15 there's the same causation flaw. Either it is to be read --  
16 as I read it, either the UCL claim is to be read as saying you  
17 intended -- you intentionally read your privacy promises  
18 differently than you should have, and that -- that borders on  
19 misrepresentation. Either it's that and they have to show  
20 reliance, or -- either way.

21           Or, if the core act is that there was a -- in either  
22 case -- maybe to put it a different way, in either case,  
23 there's a disconnect between the loss of money and property  
24 and causation. They can't show -- and again, it's for the  
25 same reasons that the contract claim has these flaws.

1        This Plaintiff can't show that the loss of money and  
2        property that she is pointing toward was caused by whatever  
3        the offending action was. If it's deception, she can't show  
4        she read the promise. If it's something else, whatever that  
5        might be, causation isn't demonstrable. That would be the  
6        flaw we would identify in the UCL claim.

7        Again, it's a UCL standing issue, that it's -- it's --  
8        whatever dot the Plaintiff finds to establish money and  
9        property, establishing causation is where their UCL claim  
10       falls down. And again, there might be many interpretations of  
11       their UCL claim, but they all fall on that causation  
12       requirement.

13       **THE COURT:** All right. And you have an argument in  
14       your reply brief that I probably read three or four times, and  
15       I just didn't understand. So, I know you can help me with it.

16       At Page 4 of your reply, you indicate that the injury  
17       preceded the challenged conduct.

18       **MS. FAHRINGER:** Ah.

19       **THE COURT:** I just couldn't wrap my head around that.  
20       Tell me what you meant by that.

21       **MS. FAHRINGER:** Yeah. And candidly, Your Honor, we  
22       patterned that after some decisions that Judge Davila had  
23       issued, because it was in language that he had used, and we  
24       thought it would -- we thought it appropriate to do that.

25       But what the translation of that is, is essentially a

1 causation argument. That if you are pointing to -- if the  
2 damage that you are pointing to is "I paid money for the  
3 app" -- that's the damage that this Plaintiff is pointing to.  
4 She's saying that \$1.77, that some portion of that is her lost  
5 money or property.

6 If that is her damage, then she needs to show that that  
7 damage is caused by -- or if that is her harm, her loss of  
8 money and property, she needs to show that it's caused by the  
9 offending actions.

10 So, the fact that it's before in time is --

11 **THE COURT:** Payment is always before in time.  
12 Always.

13 **MS. FAHRINGER:** Right.

14 **THE COURT:** I mean, never -- okay.

15 **MS. FAHRINGER:** But payment is not -- oh.

16 **THE COURT:** I guess it's just -- it's just not  
17 resonating with me, because if you and I have an agreement for  
18 you to provide a service to me, I have to do what the contract  
19 requires of me. That's pay you money.

20 **MS. FAHRINGER:** Uh-huh.

21 **THE COURT:** And then, you don't do what you were  
22 supposed to do. So my damage always precedes your failure to  
23 do what I'm asking.

24 **MS. FAHRINGER:** Payment is always preceding in time,  
25 but it's not always damage. Payment is consideration. But,

1 the payment is not necessarily the damage. Depending on the  
2 breach.

3 **THE COURT:** But in this case, the Plaintiff is not  
4 arguing that the payment -- the act of paying was her damage.  
5 It was the increment of the payment that could be attributed  
6 to her -- the value of her privacy rights in the contract that  
7 wasn't delivered.

8 **MS. FAHRINGER:** And that brings us full circle.

9 **THE COURT:** It does.

10 **MS. FAHRINGER:** Because -- yeah. So.

11 **THE COURT:** Okay. That one just kind of jumped out  
12 at me; I didn't really understand it. But maybe I can move on  
13 from that.

14 **MS. FAHRINGER:** Understood.

15 **THE COURT:** Okay.

16 **MS. FAHRINGER:** I think we would rest on the briefing  
17 with respect to the implied-covenant claim.

18 **THE COURT:** Yeah. I think that's --

19 **MS. FAHRINGER:** So, in summary, I would just note  
20 that this Plaintiff is really struggling to articulate a  
21 theory of damage that's viable. And, that's for good reason.  
22 Because there is no damage here.

23 And this Plaintiff is really struggling to find a claim  
24 that covers the facts in this case. And again, that's for  
25 good reason. Because there is none. So we've asked for the



1 complaint to be dismissed, and again, for the SCA claims to be  
2 dismissed with prejudice.

3 **THE COURT:** All right. Good. Thank you very much.

4 All right. Let's hear the rebuttal.

5 **MR. JABLONSKI:** Thank Your Honor.

6 **THE COURT:** You have a lot to work with here.

7 **MR. JABLONSKI:** I guess what I would do is I would  
8 start off by directing your attention to Paragraph 31 of the  
9 complaint.

10 **THE COURT:** Okay. I've got a lot of paper here, but  
11 I have the complaint right here. Let me get to that.

12 **MR. JABLONSKI:** Ms. Fahringer indicated that the  
13 information was provided in connection with creation of a  
14 Google account.

15 That's not -- and I think that what the defense option --  
16 or, what the defense is trying to do here is to try to put  
17 this in kind of the box with *LinkedIn*, and that interesting --  
18 that very interesting phrasing in *LinkedIn* which I've also  
19 puzzled about, which you were just talking about with  
20 Ms. Fahringer, that, I think, can be explained.

21 I'll just stop and explain it.

22 **THE COURT:** Great.

23 **MR. JABLONSKI:** What that is, is that -- that's very  
24 fact-specific to *LinkedIn*.

25 **THE COURT:** Okay.

1           **MR. JABLONSKI:** In *LinkedIn*, what happened was the  
2 plaintiff signed up for a series of promises. The whole bag  
3 of privacy promises was signed up for. All right? Then what  
4 they did later was they signed up for a higher level of  
5 LinkedIn service (Indicating).

6           And what happened then, there was this problem with  
7 LinkedIn got hacked. There's a problem with the data. Right?

8           **THE COURT:** So then we have hacking, which does come  
9 under the SCA. I mean, there we've got a whole different --

10          **MR. JABLONSKI:** Right.

11          **THE COURT:** Yeah.

12          **MR. JABLONSKI:** Right. There was that situation  
13 there.

14          **THE COURT:** Okay.

15          **MR. JABLONSKI:** And so what they were trying to do is  
16 they were relying on these privacy promises, which didn't  
17 change in between --

18          **THE COURT:** I see.

19          **MR. JABLONSKI:** -- the beginning, buying, and then  
20 the problem (Indicating).

21          **THE COURT:** Uh-huh.

22          **MR. JABLONSKI:** All right? What we're saying here,  
23 what is indicated here, partially in Paragraph 31 but  
24 throughout the complaint, is that the Plaintiff here purchased  
25 additional services by signing up for Google Wallet. And the

1 Plaintiff here was buying a secure product purchase service.

2 And the only entity that provides a product purchase  
3 service is Google. Or, Google Payment Corporation, a  
4 subsidiary.

5 **THE COURT:** So, this was secure. You're not arguing  
6 it wasn't secure, like in *LinkedIn*. It wasn't hacked.

7 **MR. JABLONSKI:** No. We're not talking about hacking.

8 **THE COURT:** So "secure" means that it's secure from  
9 thieves coming in, as opposed -- and I didn't want to use the  
10 word "unauthorized," because beauty is in the eye of the  
11 beholder, there.

12 So, okay. Go ahead.

13 **MR. JABLONSKI:** Okay. It's secured -- in connection  
14 -- what Google says is they say, "Give us your information."  
15 And they make these general promises -- general -- I guess  
16 I'll call them remonstrations, that, "We care about your  
17 privacy. We're going to keep your information private."

18 **THE COURT:** Uh-huh.

19 **MR. JABLONSKI:** And they provide certain exceptions  
20 when they won't provide that privacy for the information, that  
21 we provide them, and they say that, "We'll only give away the  
22 information that you give us, as necessary."

23 **THE COURT:** Uh-huh.

24 **MR. JABLONSKI:** The complaint -- the complaint here  
25 is that it wasn't necessary for them to give away that

1 information, to provide access to that information to third  
2 parties. And, they did that.

3 And, the Plaintiff bought a service which incorporated a  
4 promise. She didn't get the benefit of that promise. It  
5 doesn't matter whether she could have bought this somewhere  
6 else. She bought it from Google.

7 And, Google pitched it as a -- as a product purchase  
8 service that incorporates these promises and these benefits,  
9 including Google Wallet -- Google Wallet privacy policy. So,  
10 she's entitled to all of that.

11 **THE COURT:** Okay. But you're saying that that only  
12 occurs for customers who actually buy apps.

13 **MR. JABLONSKI:** Yes.

14 **THE COURT:** Because they paid no money for just  
15 having Google Wallet.

16 **MR. JABLONSKI:** You use Google Wallet to buy apps.

17 **THE COURT:** Well, I understand that. But, I've  
18 signed up for a lot of things I don't use.

19 So, what I'm trying to understand is that this is a --  
20 this -- you only can make these allegations because  
21 Ms. Swenson purchased a product.

22 **MR. JABLONSKI:** Right.

23 **THE COURT:** And she paid money. Everyone  
24 acknowledges that.

25 **MR. JABLONSKI:** Right.

1           **THE COURT:** That that's what distinguishes this  
2 from -- maybe from *LinkedIn* and from *Facebook*, and some of the  
3 other cases.

4           **MR. JABLONSKI:** Yes. That -- yes. That's --

5           **THE COURT:** Okay. And are you -- now, there are a  
6 number of contracts. And I will -- regardless of how the rest  
7 of this turns out, you are going to have to amend to put the  
8 right contracts before the Court. Because that turned out to  
9 be a problem.

10          And I don't -- I am not going to allow hyperlinks in a  
11 complaint. So -- and thank you, you know. Should we have  
12 moved on? Maybe, but I don't want to have to be online to  
13 read these things.

14          So I need you to do it the old-fashioned way, and submit  
15 them as attachments to the complaint.

16           **MR. JABLONSKI:** Yes, Your Honor.

17           **THE COURT:** And it turned out the hyperlink went to  
18 the wrong document. So, that was -- those things happen.

19          But, I do need an amendment on that, so that we, as the  
20 case goes forward, that we have it.

21          And, I think that one thing that happened was that this  
22 was a scanned submission, and so the hyperlink was not a  
23 hyperlink when it came to the Court. So it was just --  
24 anyway, not your concern, but nice to know what happens on  
25 that.

1 But, it wasn't just a click, and see the contract. It was  
2 a write it down, close out the document, go online, try to  
3 find it, hope you didn't type it wrong. And so --

4 **MR. JABLONSKI:** You always think these things are  
5 going to be easier.

6 **THE COURT:** Yeah, and then you get an old judge, and  
7 you're really in trouble.

8 **MR. JABLONSKI:** I apologize, Your Honor.

9 **THE COURT:** That's not a problem. I appreciate your  
10 trying to make it efficient. And it didn't -- unfortunately  
11 for our technology, didn't work out so well.

12 But, I guess -- I mean, I really do -- I think that there  
13 are two really significant issues that I need to be persuaded  
14 of here. And, one of them is allegations of damage that are  
15 based on fact. And, I am concerned about really understanding  
16 what your theories of damage are.

17 It seems to me like there may be four theories of damages.  
18 The threat to -- increased threat to identity theft, the loss  
19 of value of private information, the loss of benefit of the  
20 bargain, and actually some loss of money -- I'm not sure if  
21 benefit of the bargain is the same as loss of the actual money  
22 of the pennies on the dollar or -- that went to Google for  
23 brokering this transaction.

24 And so, I don't know whether there are three or four. You  
25 can help me out with what you actually meant by "benefit of

1 the bargain."

2 **MR. JABLONSKI:** By "benefit of the bargain,"  
3 Your Honor, what we mean is that she bought a set of privacy  
4 promises. That's what she was entitled to when she made this  
5 contract with Google, to use Google Wallet.

6 Every time that -- at least in this time frame, these  
7 things have changed, but -- or appear to. At least in this  
8 time frame, every time that you go and you buy a Google  
9 application -- or an application using Google Wallet, through  
10 the Google Play Store, you have to essentially reinitiate the  
11 contract again. It's all intertwined at that time.

12 **THE COURT:** Is it a different set of privacy rights  
13 when you actually buy an app, as opposed to just register for  
14 Google Wallet?

15 **MR. JABLONSKI:** Yes.

16 **THE COURT:** Okay.

17 **MR. JABLONSKI:** Yes.

18 **THE COURT:** So you're saying she -- in essence --

19 **MR. JABLONSKI:** Well, you register for Google Wallet.  
20 When you're buying the app, it's part of the process. It's an  
21 intertwined process.

22 So, I don't know if you can even register for Google  
23 Wallet, other than -- I know that you can now. But --

24 **THE COURT:** I guess what I'm saying is I presume that  
25 I register once for Google Wallet, and then every time I buy

1 an app, I use that account that I've already set up. I don't  
2 set up a new account each time.

3 Now, I don't personally use Google Wallet, but I use  
4 others, and I have that account. And it can be never used,  
5 but I still have the account. It could be used occasionally.  
6 But the second and third and fourth times, I don't set up a  
7 new account.

8 Are you saying that with Google Wallet, you actually set  
9 up a new agreement with Google Wallet, each time? Or are you  
10 just --

11 **MR. JABLONSKI:** That's the way that Google sets it  
12 up, is that you create an agreement with Google every time you  
13 make the app purchase. And they may be doing that because --

14 **THE COURT:** And those privacy rights are different  
15 than what you signed up for free, just to have Google Wallet?

16 **MR. JABLONSKI:** They change, over time. And that may  
17 be why Google does this.

18 **THE COURT:** That doesn't answer my question. Of  
19 course, everything changes over time.

20 But, is there a different quantum of privacy rights when I  
21 purchase my app than what I get for free with having Google  
22 Wallet account?

23 **MR. JABLONSKI:** I don't know, Your Honor. That was  
24 not the situation for Ms. Svenson. Ms. Svenson signed up, and  
25 bought.



1           **THE COURT:** Well, I think you need to know, because  
2 you submitted the two contracts. I apologize that I haven't  
3 read them that closely, and I will need to.

4           But, I think that your -- I thought that was the basis of  
5 your allegation, is that there was a different quantum of  
6 privacy rights that Ms. Svenson obtained when she purchased an  
7 app than when she simply signed up for the free product.

8           **MR. JABLONSKI:** That's correct. Because she has to  
9 make the contract. When she purchases the app, it's all  
10 intertwined.

11          Every time -- at least in this time frame, every time that  
12 you purchase the app, you purchase the app, they deliver the  
13 app, they process the transaction, and they make your -- they  
14 make your sensitive identifiable data available all in one  
15 intertwined activity.

16          And you have to consent at that time to the Google Wallet  
17 terms, which incorporate the Google Wallet privacy.

18           **THE COURT:** Okay.

19           **MR. JABLONSKI:** Right there. With the purchase of  
20 the app.

21           **THE COURT:** I appreciate that.

22          So, let me go back to my question. I understand that you  
23 have to do that. But I'm trying to determine whether the  
24 privacy rights that you agree to at the moment you purchase  
25 the app are different and greater than the privacy rights that

1 you got when you just -- when you gave them all your personal  
2 information to set up your Google Wallet account.

3 I mean, we just have to read the contracts, don't we? And  
4 they are before me, so I can take a look at that.

5 **MS. FAHRINGER:** I can answer. And, they're not  
6 different.

7 The Google Wallet privacy policy -- or "privacy notice,"  
8 it's called -- Google Wallet privacy notice is the Google  
9 Wallet privacy notice when you create your Google Wallet  
10 account. And that's the same Google Wallet privacy notice  
11 that the Plaintiff invokes to argue there are new promises in  
12 relation to the purchase of an app. It's the same privacy  
13 notice.

14 **THE COURT:** Because then you're not paying for it,  
15 are you, if you already have it?

16 **MS. FAHRINGER:** Then you're not paying for it.

17 **THE COURT:** Okay. Okay. I have a concern there.

18 **MR. JABLONSKI:** Your Honor, that may be -- that may  
19 be a different set of people. Typically what happens -- what  
20 happened with Ms. Svenson is she created the Google Wallet  
21 account, and she agreed to the Google Wallet terms, and she  
22 did her purchase, all in the same fell swoop.

23 And every time the -- well, the one time that she  
24 purchased another Google -- Google Play Store application, she  
25 did the same thing. She had to agree to all the terms again.

1 So, her information may have been saved from the first time,  
2 but she had to agree at the second time.

3 And the first time, when she purchased the application,  
4 which is, I think, probably typical, is -- is -- I don't know  
5 why people would do it, otherwise. Maybe -- I guess it's a  
6 placeholder.

7 But typically what happens is you establish your Google  
8 Wallet account in connection with purchasing an application.  
9 And, that's the fact pattern that we are talking about here.

10 **THE COURT:** Well, and if that's the fact pattern, I  
11 don't recall that it was drawn out that way, that these were  
12 -- this was a simultaneous continuum of events.

13 And I will just tell you, and not that the Court's  
14 experience is of much moment, but sometimes we have our kids  
15 visiting, and they say, "Mom, let me set up a Google Wallet  
16 account for you."

17 And I do that, and I say, "I don't know what I'll ever use  
18 it for," but there it is.

19 And then, a month later when my kid comes back home, I  
20 say, "I don't remember how to use this, but I want to buy that  
21 app."

22 So, I don't buy the "That's what people do" statement.

23 **MR. JABLONSKI:** All right.

24 **THE COURT:** And so, if that's the fact with your --  
25 with Ms. Svenson, --

1           **MR. JABLONSKI:** Yes.

2           **THE COURT:** -- that she did it as one continuous  
3 event, that's fine. I mean, that's her situation. Whether  
4 that makes her typical of the class, I don't know.

5           We're not at class certification. It doesn't much matter  
6 at this point.

7           **MR. JABLONSKI:** Right.

8           **THE COURT:** It matters for you, looking down the road  
9 strategically.

10          **MR. JABLONSKI:** Yes, it does.

11          **THE COURT:** But, I don't believe you actually alleged  
12 it that way.

13          And I actually thought what the complaint was telling me  
14 was that she created a Google Wallet account with one set of  
15 privacy promises, and when she bought the app, it was an added  
16 quantum of privacy that she paid for. And that that was the  
17 way you were showing that she paid for the privacy, as opposed  
18 to it being free.

19          **MR. JABLONSKI:** She created the Google -- it's an  
20 ascending series of agreements.

21          **THE COURT:** Sure.

22          **MR. JABLONSKI:** First there's the Google agreement,  
23 which gives you your gmail address and that sort of stuff.  
24 Then there's Google Play Store. And you can go to the Google  
25 Play Store and you can download all kinds of free apps. And

1 you're not entitled -- you're not entitled with that. And  
2 we're not claiming that you're entitled, because you're not  
3 paying money --

4 **THE COURT:** Right.

5 **MR. JABLONSKI:** -- for, you know, issues related to  
6 that. Then if you want to buy an application, you have to  
7 create a Google Wallet account.

8 And in Ms. Svenson's case, at least, what she did is she  
9 created the Google Wallet account in connection with  
10 purchasing the app. It's all one process. She --

11 **THE COURT:** Yeah, but I'm going to -- I'm going to  
12 give a bricks-and-mortar example here.

13 **MR. JABLONSKI:** Okay.

14 **THE COURT:** That -- why I'm concerned that that's not  
15 working, logically.

16 If I go into Macy's, and they hand me a perfume sample,  
17 and then I buy a pair of jeans, I didn't pay for the perfume  
18 sample. In fact, I'm throwing it away as quickly as I can.  
19 But, I didn't pay for it just because I gave money to Macy's  
20 for my jeans.

21 And that's what I'm afraid you're telling me here: That  
22 she signed up for Google Wallet, which she paid no money  
23 for --

24 **MR. JABLONSKI:** No; Google Play.

25 **THE COURT:** Well, we start with Google Wallet. She

1 signed up for Google Wallet, and Google Play, all right,  
2 Google Play. And then, she purchases an app.

3 So, she doesn't pay to sign up for Google Play.

4 **MR. JABLONSKI:** True.

5 **THE COURT:** And so, whatever rights she has there  
6 were free.

7 **MR. JABLONSKI:** True.

8 **THE COURT:** And then, she buys an app.

9 **MR. JABLONSKI:** Yes.

10 **THE COURT:** But that doesn't mean she's paying money  
11 for what she already got with Google Play.

12 **MR. JABLONSKI:** She's not. She's paying money for  
13 the additional promises that go along with Google Wallet.

14 **THE COURT:** Okay.

15 **MR. JABLONSKI:** The Google privacy policy and the  
16 Google Wallet terms of service.

17 **THE COURT:** So in this complaint, you need to allege  
18 facts that separate those out. Because what I'm seeing is  
19 you're -- you're trying to use the fact that she paid money to  
20 scoop up all of these other free services. And, I -- that's  
21 not going to work.

22 If you -- it sounds like you could amend that, and I would  
23 certainly give you that opportunity. But unless you can show  
24 me now where you have clearly delineated what privacy rights  
25 she got when she paid money that she would not have received

1 had she, for example, just obtained one of the free apps...

2 **MR. JABLONSKI:** Right.

3 **THE COURT:** That's what I need to know.

4 **MR. JABLONSKI:** Okay, Your Honor. It's -- I can tell  
5 you that it's in the complaint. I can't cite chapter and  
6 verse for you, but the complaint, which the Defendant has  
7 taken and pulled -- this is what Defendants do, of course, is  
8 they pull --

9 **THE COURT:** It's their job.

10 **MR. JABLONSKI:** They pull items out. But I don't  
11 think that it's a fair reading of the complaint that we have  
12 been provided by the Defendant.

13 **THE COURT:** Well --

14 **MR. JABLONSKI:** But, you're correct. It's this  
15 ascending issue.

16 **THE COURT:** Uh-huh.

17 **MR. JABLONSKI:** It's this ascending issue. And our  
18 claim is that when Google Wallet -- when you make that Google  
19 Wallet purchase, and you provide that information into the  
20 form, that you're -- you're buying something there.

21 **THE COURT:** Uh-huh.

22 **MR. JABLONSKI:** And Google calls it a "product  
23 purchase service." That's what they call it. It's a service  
24 that they provide. They talk about, you know, buying  
25 services.

1           **THE COURT:** Yeah.

2           **MR. JABLONSKI:** It's a reasonable understanding. And  
3 certainly, if the contract is to be interpreted in favor of  
4 the consumer who doesn't write any of its components, it's a  
5 reasonable understanding that you're buying that service.

6           And, and as part -- as part, when you make the purchase,  
7 you're buying the service, which is to protect your  
8 information.

9           **THE COURT:** Okay. And yes, it is reasonable. And  
10 certainly, I agree with that. But, again, I just see this as  
11 a multi-step process that you've described to me.

12           Some of the services the consumer receives are free.

13           **MR. JABLONSKI:** Yes.

14           **THE COURT:** And some may or may not be. And, I'm  
15 glad to spend the time with the complaint to find it. Of  
16 course, it's --

17           **MR. JABLONSKI:** We're glad to amend to it make it  
18 clearer, Your Honor. And I apologize if it didn't jump off  
19 the page at you.

20           **THE COURT:** And, you know, you can't --

21           **MR. JABLONSKI:** It should have.

22           **THE COURT:** And if it does when I go back and read  
23 it, then you'll win on this point. But, that's where I'm  
24 going on it.

25           **MR. JABLONSKI:** Okay.



1           **THE COURT:** That is a concern of mine.

2           **MR. JABLONSKI:** Yeah.

3           **THE COURT:** And you're telling me it's a simple  
4 matter of amendment. So, of course, it's a little bit of  
5 homework for you, but not fatal to your case, of course, if  
6 you can amend.

7           **MR. JABLONSKI:** I'm sorry we didn't talk about it as  
8 a stepped process.

9           **THE COURT:** Right. Yeah.

10          **MR. JABLONSKI:** And --

11          **THE COURT:** You know, in Superior Court, I always  
12 gave tentative rulings, and said you could come in and be  
13 ready to set me straight on my ways where I veer off the path.  
14 But this way, you have to react when you hear the question,  
15 so -- I know that's difficult.

16          **MS. FAHRINGER:** For clarity, Your Honor, the way it  
17 works: Create a Google account; provide a name. Doesn't have  
18 to be your real name. Many people do.

19          **THE COURT:** Uh-huh.

20          **MS. FAHRINGER:** And get a gmail address; agree to  
21 some privacy policies. Use Play. Create a Wallet account.  
22 No payment, no nothing.

23          **THE COURT:** And you don't have to use the Wallet  
24 account to create it.

25          **MS. FAHRINGER:** No. No. It's just as you described.

1 It's just exactly as you described.

2 **THE COURT:** Yeah.

3 **MS. FAHRINGER:** And then at some future date if you  
4 want to buy an app or use a free app, if you want to buy an  
5 app, then you buy an app. But, that's a separate process.

6 And the complaint, as the Court noted, just combines them.

7 **THE COURT:** Okay. That was my reading of the  
8 complaint.

9 **MS. FAHRINGER:** Uh-huh.

10 **THE COURT:** And, yeah. Okay. So that is a -- that  
11 is a concern of mine, to be sure that you're actually paying,  
12 because you can't lose money or property as a result of the  
13 transaction if you didn't get anything for it. If there was  
14 no additional privacy right that you got.

15 So, just to say "And I really meant it when I gave it to  
16 you for free" is not purchasing it. So, I will have to look  
17 at those contracts to see if the privacy rights are any  
18 different.

19 **MS. FAHRINGER:** Uh-huh.

20 **THE COURT:** And certainly, I will do that.

21 **MS. FAHRINGER:** And again, for clarity, Your Honor,  
22 there is no contract that applies solely to the purchase that  
23 don't also apply to the creation of a Wallet account. So  
24 that's the same -- that's the same one. That's the Wallet  
25 privacy notice, and the Wallet terms.

1       Those contracts are creation-of-Wallet-account contracts.  
2       There's no different contract that comes into play with  
3       respect to purchase.

4               **THE COURT:** So you would agree with my perfume thrust  
5       upon me when I walk into Macy's, and my jeans purchase.

6               **MS. FAHRINGER:** Yes. I don't like the perfume  
7       either, Your Honor.

8               **THE COURT:** Yeah. All right. Anything else you  
9       would like to argue?

10              **MR. JABLONSKI:** Your Honor, I think that you've --  
11       I'm not going to argue 2702, because I think that you -- you  
12       understand that very well.

13              **THE COURT:** I'm -- I'm struggling with it, I will  
14       tell you.

15              **MR. JABLONSKI:** I will go back to 2701, which I think  
16       that you had a real issue with.

17              **THE COURT:** Okay. I do have a real issue, so I do  
18       want to hear from you on that. Yeah.

19              **MR. JABLONSKI:** On 2701, Google's theory is that  
20       carte blanche, you know, per se, you can never access your  
21       stuff that is in your servers, without permission. That you  
22       are always authorized to do it.

23       And apparently built into this is the authorization to  
24       alter access, because the 2701 claim, itself, has two  
25       different prongs. The prong is the unauthorized access, and

1 the second prong is the alteration of access.

2 And the claim here, the SCA claim under 2701, is that  
3 Google altered access to the information, without necessity,  
4 that was stored on its servers by giving it to and making it  
5 available to the app developers.

6 It didn't have to do that. It committed not to do that.  
7 It was its own policy not -- to not share information unless  
8 it was necessary. But it did alter, alter access to that  
9 information.

10 And in terms of --

11 **THE COURT:** So, there's a -- I thought it was access  
12 to the facility, not to the information. And this may be --

13 **MR. JABLONSKI:** It is access to the facility.

14 **THE COURT:** Okay, because here's my concern. And  
15 maybe I don't understand the technology, and I tend to make it  
16 more concrete than it is. So, please correct me if I'm wrong.

17 But, I don't think you've alleged that the vendor has  
18 access to the facility, the server.

19 **MR. JABLONSKI:** Oh, yes.

20 **THE COURT:** I think the allegation is that Google,  
21 itself, is choosing to remit the information to the vendor,  
22 not that the vendor has come into the facility in a virtual  
23 sense.

24 **MR. JABLONSKI:** In a virtual sense, Your Honor,  
25 that's exactly how it works, is they do come into the

1 facility. A vendor has to have the Google -- the vendor side  
2 of a Google Play account.

3 **THE COURT:** Sure.

4 **MR. JABLONSKI:** Or the vendor side of the Google  
5 Wallet account, I guess you'd call it. And that information  
6 is stored on Google's servers.

7 And what happens is they have access -- like for a gmail  
8 account, the information's stored on Google servers. It's not  
9 necessarily on your computer, unless you put it there.

10 This is comparable to that. And actually, it looks like  
11 an email account. And the information goes into and is made  
12 available to the vendor who has this account with Google.

13 And, the dictionary definition of "access" is basically,  
14 to provide access to. If I give you -- if I give you a key to  
15 a cottage in northern Wisconsin, Mosquitoville, if I give you  
16 a key to that, I've certainly altered access to it.

17 **THE COURT:** Yes.

18 **MR. JABLONSKI:** Even though I haven't -- you know,  
19 even though I -- I haven't given it to you, but I've given you  
20 a key, so I've altered the access to it.

21 Alteration of access is a prong under 2701, and it's  
22 something that they're prevented from doing. They're also  
23 pre- -- I'll stop, because you have a question.

24 **THE COURT:** Well, but, okay. So, you're talking  
25 about access to the cottage by giving the key, and someone

1 goes into the facility there.

2 So, what if the issue is you really want to sit in that  
3 chair in the cottage? So I could give you the key, and you  
4 could go in and sit. Or I could put the chair out in the  
5 front yard, and you could sit in it. I haven't given you  
6 access to the facility; I've given you the item you want.  
7 That's what I'm seeing here.

8 But again, I don't understand the technology, and I don't  
9 know whether this is opening the door of the facility for the  
10 vendor to go in and access Ms. Svenson's information, or if  
11 Google goes into its own facility and sends it out. That's  
12 what -- you haven't alleged -- and, does it matter?

13 And, am I going the wrong -- am I on a tangent here?

14 **MR. JABLONSKI:** I think that you're on -- well, I --  
15 I don't know whether it would matter. It's access to a  
16 facility, though, and it's -- it's access to the information,  
17 which is in --

18 **THE COURT:** It's access to the information.

19 **MR. JABLONSKI:** Which is in Google's facility.

20 **THE COURT:** Well, but, the SCA does not equate  
21 "facility" with "information."

22 **MR. JABLONSKI:** That's correct.

23 **THE COURT:** So, that's why I'm drawing the  
24 description. Because we're presuming, based on your  
25 complaint, that the identifying information was -- that the

1 vendor obtained it.

2 And so I'm asking, under 2701, does the method of  
3 obtaining it make a difference?

4 We know that Google went into its own facility to access  
5 the information. I was under the impression from the  
6 complaint and then Google sent it, caused to be sent to the  
7 vendor, as opposed to Google authorizing the vendor to come in  
8 and get it.

9 To me, they're different.

10 **MR. JABLONSKI:** There's -- if you send something to  
11 me and it is in my gmail account, then -- and I don't  
12 download, you know, I don't put those on the hard drive on  
13 this machine here (Indicating), then it's on Google's  
14 facility. But I think you've also sent it to me.

15 So, I'm -- I'm struggling with the distinction.

16 **THE COURT:** Well, then --

17 **MR. JABLONSKI:** Because I think that it's on Google's  
18 facility. I have access to it, obviously. You sent it to me.

19 **THE COURT:** But I -- yeah. Hm. Okay. I'm -- I'm  
20 struggling with that.

21 **MR. JABLONSKI:** Okay.

22 **THE COURT:** And, maybe I shouldn't be.

23 **MS. FAHRINGER:** The -- the 2701 analysis is so clear.  
24 Access to facilities is a threshold requirement.

25 The facilities at issue in this case, no -- nothing

1 ambiguous about the complaint, and they can't change this  
2 allegation. The facilities at Complaint Paragraph 119 are  
3 Google's own servers.

4 Case after case after case after case, and the SCA,  
5 itself, confirm that a service provider does not violate 2701  
6 by accessing its own facilities. The very claim that's made  
7 in this case.

8 That's *Crowley, Fraser, Bohach, Buza v. Yahoo!, In Re:*  
9 *Google Privacy Policy Litigation*.

10 And in fact, in *In Re: Google Privacy Policy Litigation*,  
11 the Court described a claim against Google for accessing its  
12 own servers under 2701, it described that claim as bordering  
13 on frivolous.

14 **THE COURT:** Yeah. That was Judge Grewal's opinion.

15 **MS. FAHRINGER:** Yes. There's not one case.

16 **THE COURT:** And that's why I think 2202 --

17 **MS. FAHRINGER:** 2702.

18 **THE COURT:** 2702 -- is, if anything, is where this  
19 case lives, because that is the -- if this is not a record and  
20 it is the contents of a communication, that's where the  
21 liability might lie. But, I have to get through that.

22 I guess I'm just not persuaded on this argument on 2701.  
23 I'm not seeing it.

24 **MR. JABLONSKI:** If I could just give you a couple --

25 **THE COURT:** Please.



1           **MR. JABLONSKI:** Two or three cases? There's a case  
2 that we looked up recently. And it's called *Cousineau* -- I'll  
3 give your staff -- it's on there, but I will provide the cite  
4 to that.

5           And, in *Cousineau*, it was a Microsoft case. And,  
6 Microsoft had brought a motion to dismiss. And the motion --  
7 and it had to do with information that was on cell phones.

8           And the issue -- what the court said is the court said --  
9 the cell phone, obviously, that's been dealt with elsewhere.  
10 But the court in the *Cousineau* case said, "I don't know that  
11 this..." -- this is geolocation information -- "...that that's  
12 not also on Microsoft's facilities."

13           And what the Court said is that you can't -- Microsoft was  
14 precluded from selling this product to people or getting  
15 people to use this service because of its own policy under the  
16 promise of confidentiality, and that "We will respect your  
17 privacy." And then they can just violate that, because they  
18 could violate it in the absence of that policy.

19           The notion of authorization presumes that there's  
20 authorized access and unauthorized access. And, there are  
21 cases -- the *Theofel* case, the *Councilman* case -- in which  
22 access to information that was on an electronic services  
23 provider's own systems was found to be in violation of related  
24 laws.

25           For example, the *Theofel* case was -- I think it was the

1 Computer Fraud Act. And what the court did there was they  
2 talked about this information being like in bailment. Or, if  
3 you gave me something for safekeeping, you give me some of  
4 your papers for safekeeping, I can't -- and I'm keeping them  
5 in a locked box for you, that doesn't mean that I can go -- I  
6 can go into that locked box to move them to another safe  
7 place, because that's -- that's the nature of the  
8 relationship.

9 And what we have here is we have commitments that are made  
10 by Google, that Google articulates in its privacy policies.

11 **THE COURT:** But you are now merging the contract  
12 requirements with 2701. So, you're just -- you're just  
13 talking about a basic 2701, and what conduct is proscribed by  
14 2701.

15 The contract language is irrelevant to me when I'm looking  
16 at your 2701 claim.

17 **MR. JABLONSKI:** Well, it --

18 **THE COURT:** Because -- well, you have a separate  
19 claim for civil liability under 2701. And 2701, the door  
20 doesn't open there broader because of the parties' contractual  
21 obligations.

22 **MR. JABLONSKI:** I think -- well, Your Honor, I think  
23 that we may have a disagreement about that, because --  
24 because -- not necessarily because of the contract  
25 obligations, but because of their own policies. Their own

1 policies.

2 **THE COURT:** Okay.

3 **MR. JABLONSKI:** They can't violate their own  
4 policies, and either access, or certainly, alter access --

5 **THE COURT:** So they violate 2701 by violating their  
6 own policies? Or they've just breached a contract?

7 **MR. JABLONSKI:** They've violated -- they violated  
8 2701, we think. When they violate their own policies that  
9 they have put out there, they violate 2701.

10 And with respect to the access issue, I don't even think  
11 that we -- we don't need this analysis. This is separate from  
12 the access issue.

13 **THE COURT:** If you have the citation on the Microsoft  
14 case, *Cousineau*, I'd appreciate that. And you can get that to  
15 us. I don't think that's in your brief. I don't remember  
16 that case.

17 **MS. FAHRINGER:** No.

18 **MR. JABLONSKI:** It was not in our brief, Your Honor.

19 **THE COURT:** Okay. I'm glad to take a look at that.

20 All right. We do need to wrap up. I find the case  
21 interesting, and I want to make sure I understand it.

22 So, anything else?

23 **MS. FAHRINGER:** No, Your Honor.

24 **THE COURT:** Okay. Well, thank you both very much.

25 And, if I may just say, to save you some effort on this, I

1 know that Judge Davila graciously granted the motions for  
2 extended briefing. And, please be aware that is not my  
3 practice. That's not my policy. And it would be highly  
4 unusual for me to be as gracious as Judge Davila was.

5 So, I don't want to you write a long brief and then ask  
6 for the extended pages. That would be really unfair to you,  
7 to think that you got it once, and so it would merit it.

8 You may not want that, but I just don't want you to put in  
9 all that work and then have to scramble to cut it down.

10 All right. Thank you.

11 **MS. FAHRINGER:** Thank Your Honor.

12 **MR. JABLONSKI:** Thank you, Your Honor.

13 (Conclusion of Proceedings)  
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**CERTIFICATE OF REPORTER**

I, BELLE BALL, Official Reporter for the United States Court, Northern District of California, hereby certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/ Belle Ball\_\_\_\_\_

Wednesday , July 23, 2014

Belle Ball, CSR 8785, CRR, RDR